



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-2019-0006; Notice 2]

Volkswagen Group of America, Inc., Grant of Petition for Decision of Inconsequential Noncompliance

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Grant of petition.

SUMMARY: Volkswagen Group of America, Inc. (Volkswagen), has determined that certain model year (MY) 2015-2016 Audi A3 and Audi S3 motor vehicles do not comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 108, *Lamps, Reflective Devices, and Associated Equipment*. Volkswagen filed a noncompliance report dated January 28, 2019, and a petition was received by NHTSA on January 28, 2019, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety. This document announces the grant of Volkswagen's petition.

FOR FURTHER INFORMATION CONTACT: Leroy Angeles, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), (202) 366-5304, Leroy.Angeles@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Overview: Volkswagen has determined that certain MY 2015-2016 Audi A3 Sedan, S3 Sedan, and A3 Cabriolet motor vehicles do not comply with paragraph S9.3.6. of FMVSS No. 108, *Lamps, Reflective Devices, and Associated Equipment* (49 CFR 571.108). Volkswagen filed a noncompliance report dated January 28, 2019, pursuant to 49 C.F.R. 573, *Defect and Noncompliance Responsibility and Reports*, and a petition received by NHTSA on

January 28, 2019, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety, pursuant to 40 U.S.C. 30118 and 49 U.S.C. 30120, *Exemption for Inconsequential Defect or Noncompliance*.

Notice of receipt of Volkswagen's petition was published with a 30-day public comment period, on July 9, 2019, in the **Federal Register** (84 FR 32830). One comment was received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at <https://www.regulations.gov/>. Then follow the online search instructions to locate docket number "NHTSA-2019-0006."

II. Vehicles Involved: Approximately 81,831 MY 2015-2016 Audi A3, S3 Sedan, and A3 Cabriolet motor vehicles, manufactured between November 28, 2013, and July 28, 2016, are potentially involved.

III. Noncompliance: Volkswagen explains that the noncompliance is that the subject vehicles are equipped with turn signal pilot indicators that do not meet the flashing rate as required by paragraph S9.3.6 of FMVSS No. 108. Specifically, the left turn signal indicator does not have a significant change in the flashing rate when the left rear turn signal LED array becomes inoperative.

IV. Rule Requirements: Paragraph S9.3.6 of FMVSS No. 108 provides the requirements relevant to this petition. Failure of one or more turn signal lamps, such that the minimum photometric performance specified in Tables VI or VII of FMVSS No. 108 is not being met, must be indicated by the turn signal pilot indicator by a "steady on," "steady off," or by a significant change in the flashing rate.

V. Summary of Volkswagen's Petition: Volkswagen describes the subject noncompliance and contends that the noncompliance is inconsequential as it relates to motor vehicle safety. The following views and arguments presented in this section, "V. Summary of Volkswagen's

Petition,” are the views and arguments provided by Volkswagen and do not reflect the views of the Agency.

In support of its petition, Volkswagen offers the following reasoning:

- a) The driver receives two different indicator warnings that the rear brake light is inoperative in the instrument cluster immediately upon failure of the turn signal lamp to comply with the photometry requirements of FMVSS No. 108. This happens because the brake light and indicator light/turn signal are combined.
- b) The subject condition, the lack of a turn signal pilot indicator flash rate change, is limited to the condition in which the outermost left rear turn signal lamp fails.
- c) In the case of LED array failure, both the brake light and indicator light/turn signal become inoperative. Should the required left turn signal become inoperative, Volkswagen confirmed that other auxiliary left turn signal lights located on the trunk and the left side mirror are still operational. Additionally, the back-up lamp in the left rear tail lamp assembly, the left brake light in the trunk lid assembly, and the center high mount stop lamp, will remain operational.

Volkswagen concludes that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

VI. Public Comments: NHTSA received one comment from the public. This comment was received from an individual who believed that Volkswagen’s reasoning is unclear as it stands, and that NHTSA should request more information from Volkswagen or deem the noncompliance consequential. The commenter said that it is unclear as to whether the “two different indicator warnings in the instrument cluster” are compliant and that a redundancy should not be considered an appropriate substitute for a well-functioning, compliant failure indicator that’s required by the FMVSS. The commenter also said that the rule requirements are fairly clear with

the possible exception of the lack of specificity of the word “significant” in the phrase “significant change in the flashing rate” but that lack of specificity isn’t addressed by Volkswagen’s petition. The commenter also questioned the reasoning in paragraph 2 of the petition that the warning that “both lights” had become inoperative was equivalent to the specific warnings required by the Standard.

VII. NHTSA’s Analysis: The burden of establishing the inconsequentiality of a failure to comply with a *performance requirement* in a standard—as opposed to a *labeling requirement*—is more substantial and difficult to meet. Accordingly, the Agency has not found many such noncompliances inconsequential.¹ Potential performance failures of equipment like seat belts or air bags are rarely deemed inconsequential.

An important issue to consider in determining inconsequentiality based upon NHTSA’s prior decisions on noncompliance issues was the safety risk to individuals who experience the type of event against which the recall would otherwise protect.² NHTSA also does not consider the absence of complaints or injuries to show that the issue is inconsequential to safety. “Most importantly, the absence of a complaint does not mean there have not been any safety issues, nor does it mean that there will not be safety issues in the future.”³ “[T]he fact that in past reported cases good luck and swift reaction have prevented many serious injuries does not mean that good luck will continue to work.”⁴

¹ Cf. *Gen. Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance*, 69 FR 19897, 19899 (Apr. 14, 2004) (citing prior cases where noncompliance was expected to be imperceptible, or nearly so, to vehicle occupants or approaching drivers).

² See *Gen. Motors, LLC; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 35355 (June 12, 2013) (finding noncompliance had no effect on occupant safety because it had no effect on the proper operation of the occupant classification system and the correct deployment of an air bag); *Osram Sylvania Prods. Inc.; Grant of Petition for Decision of Inconsequential Noncompliance*, 78 FR 46000 (July 30, 2013) (finding occupant using noncompliant light source would not be exposed to significantly greater risk than occupant using similar compliant light source).

³ *Morgan 3 Wheeler Limited; Denial of Petition for Decision of Inconsequential Noncompliance*, 81 FR 21663, 21666 (Apr. 12, 2016).

⁴ *United States v. Gen. Motors Corp.*, 565 F.2d 754, 759 (D.C. Cir. 1977) (finding defect poses an unreasonable risk when it “results in hazards as potentially dangerous as sudden engine fire, and where there is no dispute that at least some such hazards, in this case fires, can definitely be expected to occur in the future”).

NHTSA has reviewed and evaluated the merits of the inconsequential noncompliance petition submitted by Volkswagen.

For this petition, NHTSA first considered the subject lamp configuration which consists of four light assemblies on the rear of the subject vehicles. Two outboard assemblies are mounted to the rear quarter panels and two inboard assemblies are mounted on the trunk lid. These pairs of assemblies, one on each side of the vehicle, are mounted adjacent to each other. When a turn signal is activated by the driver, the turn lamps in both the outboard and inboard assemblies on the side of the vehicle corresponding to the direction the driver selected, will illuminate. Volkswagen explained that the auxiliary inboard lamps will remain operational should the outboard lamps become inoperative. The Agency did not find these factors to be compelling in granting this petition.

Instead, the Agency found the following considerations to be most relevant to its decision:

- a) While the turn signal pilot indicator does not change in flash rate when the left outboard turn signal lamp fails to meet the photometric requirements, the subject vehicles provide the drivers an alternative method of notification. According to Volkswagen's petition, the noncompliance in the subject vehicles is limited to when the left rear outboard turn signal lamp fails, and if the left inboard turn signal lamp should fail, the turn signal pilot indicator will function. Given these conditions, the noncompliance creates a scenario where a failure in the left outboard turn signal lamp will not activate the "fast flash" in the pilot indicator. While the driver is not alerted to a failure of the required turn signal lamp by means of a change in the flash rate of the turn signal pilot indicator lamp, if both the required turn signal lamp and the auxiliary turn signal lamp fails, the driver will be alerted by the means specified in the standard. In the event this inboard turn signal lamp should fail, the turn signal pilot indicator will alert the driver.

- b) In addition, Volkswagen has provided at least two other warning lights that illuminate to make the driver aware of the failure. A warning light will illuminate at vehicle start-up or when the failure occurs while driving. There will also be a constant bulb out indicator in the central information display while the turn signal lamp is inoperative. Additionally, if the left outboard turn signal lamp is out, all other required lamps still operate as designed.

In response to the public comment stating that “a redundancy should not be considered an appropriate substitute for a well-functioning, compliant failure indicator that’s required by the FMVSS,” NHTSA agrees that an alternative method of notification is not a substitute for complying with a FMVSS. However, NHTSA has recently granted other petitions such as those submitted by Mack Trucks Inc. and Volvo Trucks North America where an alternative method of notification was a factor considered in granting the petition.⁵ While manufacturers are not permitted to knowingly certify a vehicle that does not comply with the FMVSS, NHTSA can consider whether such an alternative method of performance is a mitigating factor when determining the effect of the noncompliance on safety.

In the case of the subject petition, failure of the left rear outboard turn signal will result in the illumination of a steady burning general warning telltale, while a failure of the left rear inboard turn signal will produce a compliant “fast flash” warning. Thus, some form of notification will always result from a failure and an FMVSS No. 108-compliant warning will occur if both rear left turn signal lamps fail. Based on the specifics of this case, NHTSA believes this alternative warning provides adequate notice to drivers that the left rear turn signal lamp has failed such that this noncompliance is inconsequential to motor vehicle safety.

VIII. NHTSA’s Decision: In consideration of the foregoing, NHTSA finds that Volkswagen has met its burden of persuasion that the FMVSS No. 108 noncompliance is inconsequential as it

⁵ See *Mack Trucks, Inc., and Volvo Trucks North America, Grant of Petitions for Decision of Inconsequential Noncompliance*, 84 FR 67766, December 11, 2019.

relates to motor vehicle safety. Accordingly, Volkswagen's petition is hereby granted and they are exempted from the obligation to provide notification of and remedy for the subject noncompliance in the affected vehicles under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject vehicles that Volkswagen no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve vehicle distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant vehicles under their control after Volkswagen notified them that the subject noncompliance existed.

(Authority: 49 U.S.C. 30118, 30120; delegations of authority at 49 CFR 1.95 and 501.8)

Otto G. Matheke, III,

Director, Office of Vehicle Safety Compliance.

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